TABLE OF CONTENTS

Cases Cited

Statutes and Regulations Cited

In the Supreme Court of the United States

OCTOBER TERM 1970

No. 1331

AFFILIATED UTE CITIZENS OF THE STATE OF UTAH, et al,
Petitioners,

vs.

UNITED STATES, et al,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENT First Security Bank of Utah, N. A.

STATEMENT OF THE CASE

This petition involves a suit by twelve "mixed blood" members of the Ute Indian Tribe against First Security Bank of Utah, N. A., charging violation of Regulation 10b-5 (17 C.F.R. 240 10b-5), promulgated under Section 10(b) of the Securities Exchange Act

of 1934 (15 U.S.C. 78(j)). The petition is from a judgment of the Court of Appeals of the Tenth Circuit reversing a judgment by the trial court in favor of the petitioners.

Eighty-five "mixed blood" members of the Ute Indian Tribe of the Uintah and Ouray Reservation, Utah, brought suit against the United States of America, First Security Bank of Utah, N.A., John B. Gale, Verl Haslem and several used car dealers. The used car dealers eventually settled and were dismissed from the action. The Court and counsel agreed that twelve "bellweather" plaintiffs would be selected or designated and their cases tried first.

There were four hundred ninety mixed bloods in the Tribe. Each was issued ten shares of the capital stock of the Ute Distribution Corporation (a Utah corporation created under the supervision of the Department of Interior) representing his interest in "unadjudicated or unliquidated claims against the United States, all gas, oil and mineral rights of every kind and all other assets not susceptible to equitable and practicable distribution to which the mixed blood members of the Tribe, as determined by Public Law 671, are now or may hereafter become entitled. . . . " (A. 465). Only eighty-five mixed bloods brought this suit and the rights of only twelve of the eight-five are being adjudicated on this appeal.

Defendant First Security Bank of Utah, N.A., hereinafter referred to as the "Bank", by written contract with the Ute Distribution Corporation, Pl. Ex. 18, (E.13) became the transfer agent, depository, bookkeeper and dividend distributor for that corporation.

Defendants John Gale and Verl Haslem, hereinafter referred to as "Gale" and "Haslem", were Assistant Managers of the Roosevelt, Utah office of the Bank.

Section VIII of the Articles of Incorporation of the Ute Distribution Corporation provided that no sale of any stock of the corporation prior to August 27, 1964, would be valid unless offered first to members of the Tribe in a form to be approved by the Secretary of Interior. It was further provided that if such offer of sale was not accepted by any member of the Tribe, the sale thereof could then be made to a nonmember, but only for the same or greater amount and upon the same terms and conditions upon which it had been offered to the Tribe members, and providing the Superintendent of the Reservation certified that the offer had been made to the Tribe in accordance with law and the regulations of the Secretary of Interior (A. 465, 66).

Sales made after August 27, 1964, were subject to no such limitations and were free to be bought and sold the same as any other unrestricted corporate shares (A. 466).

To implement the provision of Article VIII of the Articles of Incorporation, the Bank recommended a procedure designed to protect the mixed bloods and the Tribe in connection with the pre-August 27 sales. In substance it provided that the mixed blood must (1) post an offer of sale to the Tribe at a specific price per share for a period of thirty days; (2) if there were no takers, he could openly negotiate for the sale to a nonmember and sign an affidavit to the effect that he had received the same amount that he had posted it for; (3) sign a stock power with signature guaranteed

authorizing the Bank to transfer his stock; (4) submit the affidavit and stock power to the Superintendent of the Uintah and Ouray Reservation for his examination and certification as to compliance with the required procedure; (5) after the Superintendent satisfied himself as to the regularity of the transaction, he was to submit a written certification of compliance to the Bank; and (6) the Bank was then required to transfer the stock to the Buyer (Pl. Ex. 45) (E. 29) (A. 286).

The recommendations made by the Bank for the protection of the mixed bloods was approve d and adopted by the Secretary of Interior in accordance with Article VIII of the Articles of Incorporation of the Ute Distribution Corporation. The plan had the approval of the Ute Distribution Corporation and the Superintendent of the Reservation (A. 286).

The provision for the signing of stock powers or authorizations to transfer was adopted instead of endorsement on the certificate itself because the officers of the Ute Distribution Corporation and the Secretary of Interior, through his agent, the Superintendent of the Reservation ,believed it would be beneficial to the Indians to have the Bank hold the certificates rather than the mixed bloods themselves, because of the fear that some of them would lose their certificates (A. 340, 287, 294). Consequently, the Bank, as transfer agent, held the certificates pursuant to the instructions from the Ute Distribution Corporation, with whom it had the contract to serve as transfer agent.

Most of the mixed bloods lived in the Uintah Basin near Roosevelt, Utah. The Bank made its Roosevelt office available for use by the mixed bloods in the event

they wanted to have their stock transfer authorization signatures guaranteed there and their affidavits notarized. The Roosevelt office did not handle the transfers. There were handled by the Trust Department oflice of the Bank in Salt Lake City where the transfer books and the stock certificates were held. (A. 275, 276).

Because the Bank made this assistance available to the mixed bloods, some of them came into the Bank, signed the stock powers before defendant Gale, who was authorized to guarantee signatures, and he, being a notary, notarized many of the affidavits, which were then sent to the Superintendent for examination. After examination of the stock powers and affidavits by the Superintendent, the Superintendent sent his certification to the Trust Department of the Bank in Salt Lake and the stock was transferred (A. 295).

With respect to sales made prior to August 27, 1964, no shares were transferred by the Bank until the Bank had received written certification from the Superintendent to the effect that the offer to the members of the Tribe had been made in accordance with law and the regulations of the Secretary of Interior, and that the Superintendent had on file the requisite affidavit evidencing the receipt by the mixed blood of the price for which the stock had been posted. (A. 295, 517, 518, 475, 479, 480, 482, 483, 485, 488, 490, 491, 492, 493, 495, 496, 497.)

During 1963-64 mixed bloods sold 1,387 shares to white men (A. 523). No shares were bought by members of the Tribe. Of these shares, only fifty were bought by Verl Haslem, and all of those were purchased after August 27, 1964. Only sixty-three shares were bought

by Gale (forty-four prior to August 27, and nineteen after). Out of the 1,387 shares sold by mixed bloods to white men, Gale and Haslem together bought only one hundred thirteen shares or 8 1-3% of the shares sold. Of the one hundred twenty shares sold by the twelve bellwether plaintiffs, Gale purchased ten (five from Glen Reed and five from Wopsock) and Haslem purchased six (five from Glen Reed and one from Arthur Workman). There were thirty-two other white men who bought directly from mixed bloods during 1963 and 1964 (A. 523); Gale and Haslem paid cash for each of the shares they purchased (A. 475, 476, 479, 480, 490), With regard to those shares purchased by Gale prior to August 27, 1964, he paid as much or more than the stock was posted for and on the same terms, so that the law and regulations were complied with as far as his purchases were concerned. With regard to Haslem's purchases, there were no requirements of posting, no stock powers to be signed (as the certificates themselves were endorsed by the mixed blood) and there were no limiting terms or conditions to be complied with in connection with the sales.

The Court's own Findings of Fact to the effect that the price at which shares of stock sold between and among white men during the pertinent period ranged between $500 and $700 (A. 529). There was no evidence of any sale in excess of $700, and the evidence was that most of the sales between white men, ranged between $400 and $550. The sales from mixed bloods to white men ranged between $300 and $700. (A. 529). That fact is exemplified by sales made by the 12 bellwether plaintiffs themselves. (A. 474-498).

Some of the alleged facts in petitioners' counsel's Statement of the Case and Argument are so flagrantly false and misleading as to require comment. One of the most offensive paragraphs in that respect is found on page 10 of petitioners' brief. It reads as follows:

> "The officers of the Bank, at its Roosevelt office located on the Indian Reservation, then began trafficing in the stock—performing functions which were substantially those of a broker in the regular securities markets. They located purchasers of the stock throughout the United States, who maintained substantial deposits in the bank for the purpose of making purchases. They also arranged for agents, usually used car dealers, who contacted Indians during periods of economic crisis, sometimes contrived (as in the case of Melvin Reed, who was subjected to a large fine for drunkenness by one of the Bank officers acting in the capacity of Justice of the Peace), and sometimes already existent (as in the case of Letha Wopsock who needed money because she had been requested by the Chief to operate a concession stand for the annual Sun Dance). Such market as ever existed for the UDC stock was largely maintained by the Bank officers for their out of state clients, at prices fixed by the Bank officers in Roosevelt and at its central office in Salt Lake City."

In the first place, the Roosevelt office was not located on the Indian Reservation. Second, "performing functions which were substantially those of a broker in the regular securities markets" is an inordinate exaggeration as is the statement: "They located purchasers of the stock throughout the United States. . . ." To support these allegations petitioners' counsel cites A. 500-522 and exhibits appearing on pages 108-119 of the

Appendix. According to the petitioners' own references, there were only seven out-of-state purchasers involved.

Third, the statement that the Bank officers "arranged for agents, usually used car dealers," is a falsehood. The entire record reveals only one used car dealer with whom one of the Bank officers (Gale) had an arrangement in connection with the purchase and sale of mixed blood stock. The petitioners' documentation to support that statement (A. 484-86 and A. 41) makes no reference to such "agents" other than the one used car dealer, Nick Murray. At A. 41 there is no reference whatsoever to the arrangement for an agent by the Bank's officers.

Fourth, supposedly supporting the ridiculous statement that the market for UDC stock was maintained by Bank officers for their out-of-state clients is A. 529. Petitioners' counsel says: "The trial judge so concluded." That is an absolutely false statement. At page 529 of the Appendix, counsel's reference, the court makes the following statement, which is Paragraph 7 of his Findings of Fact related to damages:

> "7. While considerable market data are available concerning the value of said stock, such data are not deemed fully indicative of the fair value of the stock for the purposes of this action. The prices paid during said period were influenced by the improper activities of Gale and Haslem and the negligence of the government as herein found, and by the facts that the typical Indian seller was not as well informed of the potential value of said stock as the typical buyers, the number of sellers exceeded the number of buyers, and the typical Indian seller was under heavy economic pressure to sell. There is evidence that a well informed em-

> ployee of the government had expressed the opinion that the stock was worth in excess of $700 per share. Only a portion of the depressant factors was attributable to the defendants, and there is indication that in sales between white persons where most of these factors were of minimal importance or were non-existant the price did not materially exceed $700 per share. *There is evidence also that the tribe had reasonable opportunity to purchase when its officials were as well informed concerning the potential value of the stock as anyone, and that it declined to purchase such stock at available prices ranging between $350 and $700.*" (Emphasis supplied.)

There is not a single word in said Findings of Fact indicating that the Bank officers maintained a market for its out-of-state clients at prices fixed by the Bank officers. The fixing of prices by the Bank officers at $350, petitioners attribute to an entry in the minutes o fa UDC meeting at page 330 of the Appendix. There the UDC officers and Mr. Cowan, Trust Officer of the Bank, were discussing the value of the stock from the standpoint of possible loan from the Bank. Mr. Cowan, based in part on what the tribe had decided, expressed his opinion that the value of the stock was nearer $350 per share than $500 per share. The court in the Finding of Fact referred to above states that the evidence is that the tribe had reasonable opportunity to purchase, that its officials "were as well informed concerning the potential value of the stock as anyone, and that it declined to purchase such stock at available prices between $350 and $700." If anyone can take credit for "fixing" the price, it would have to be the tribe itself, not Mr. Cowan, who was merely reflecting the opinion of the tribe.

The fact is clear from the evidence that the price was not fixed by anyone at $350. The court's own Finding of Fact quoted above and referred to by petitioners' counsel himself proves that. In the trial court's Finding of fact No. 6 (A. 529) the court said:

> "The evidence indicates that during the years 1964 and 1965, stock in the te Distribution Company was being sold by mixed bloods at a price between $300 and $700 per share."

The Tenth Circuit with respect to this issue said:

> "....The evidence does not support the finding that the market price was depressed by the defendants."

Obviously counsel's entire paragraph is unsupported by his own references and an inexcusable misstatement of the evidence.

On page 15 of his brief, counsel states:

> "The seventy-four pages of detailed findings of fraud obviously cannot be summarized in the space of this brief, . . ."

Apparently petitioners' counsel is loosely referring to the trial court's Findings of Fact. It is incomprehensible that petitioners' counsel would resort to such a shabby falsehood in a brief filed with this Honorable Court and expect to retain credibility.

The fact is that in seventy-six pages of Findings of Fact, the trial court used the word "fraud" only once, and that was when the court said:

> "The United States did not fraudulently or otherwise conceal or secrete from the plaintiffs the existence of any cause of action . . ." (A. 511).

Never once in the seventy-six pages did the court use the term "fraud" with respect to the defendants Gale, Haslem or the Bank.

It is true that in the Conclusions of Law the trial court devoted three pages to the proposition that Gale and Haslem had violated Regulation X10b-5. But at no time did the court use the term "fraud".

The Tenth Circuit said:

> "The record does not support the trial court's finding of a conspiracy, plan or scheme to violate any duties owed to the plaintiffs by any of the defendants."

In light of the examples cited above demonstrating the desperate carelessness or deliberate distortion with which petitioners' counsel treats the evidence, it is not surprising that the United States Court of Appeals paid little deference to petitioners' counsel's version of the facts.

SUMMARY OF ARGUMENT

The respondent respectfully urges this Court to uphold the decision of the United States Court of Appeals for the Tenth Circuit.

The respondent believes it is not guilty of violating 10b-5 because its employees Gale and Haslem did not violate it.

Each petitioner's claim must be examined separately and the law applied to the facts in his particular case. The process is simplified by the circumstance that respondents Gale and Haslem engaged in sales transactions with

only three of the twelve petitioners. It is those three alone to whom misstatements could have been made and they alone could charge Haslem and Gale with failure to disclose. If there was a misstatement or nondisclosure with respect to one or more of the three, then the question of reliance becomes significant.

With respect to the issue of reliance this respondent bases its position chiefly on the case of *List v. Fashion Park, Inc.*, 340 F.2d 457 (2nd Cir. 1965) which states among other things:

> ". . . The test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipient's] loss.' (Citations). The reason for this requirement, . . . is to certify that the conduct of the defendant actually caused the plaintiff's injury. . . .
>
> "The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact."

Petitioners' contention that the Bank violated 10b-5 rests solely on their allegations that its agents, Gale and Haslem, violated that regulation. The Bank did not buy or sell any shares of stock of the Ute Distribution Corporation and realized no profit from the sale of any such shares.

Respondent John Gale purchased stock from only two of the bellwether plaintiffs. He bought five shares from Glen Reed at $350 a share and sold them at $530 a share. The trial and circuit courts found that Gale made a material misstatement to Reed when he told Reed $350 was all that people were paying and was guilty of a culp-

able nondisclosure when he failed to inform Reed that he, Gale, could sell the shares to an out-of-state buyer for $530 a share. It is the Tenth Circuit's position that the record held no evidence that Reed relied on Gale's representation. On the issue of reliance respondent concurs with the Circuit and adds that there is affirmative evidence that Reed did not rely and that therefore the misstatement or nondisclosure was not the proximate cause of damage, if any, suffered by Reed.

Gale bought five shares from Mrs. Wopsock. He sold the first two shares at the same price he paid for them, and there is no evidence that he sold the other three shares at a price in excess of the amount he paid. There is no evidence of any misstatements or nondisclosures to Mrs. Wopsock. There is affirmative evidence that she did not rely on any representation made by Gale. She had independent knowledge as to the value of the stock based on her previous sales to other persons and her conversations with the Assistant Superintendent of the Indian Reservation.

Gale did not purchase stock from any of the other ten bellwether petitioners. He did not participate in the negotiations involving any sales by the other ten petitioners. There is no evidence that he made any misstatements or that he was guilty of any nondisclosures with respect to any of the other ten petitioners. The only thing he had to do with any of the other ten petitioners' transactions was to perform ministerial duties of guaranteeing signatures or notarizing affidavits. He was a complete stranger to some of the transactions.

Verl Haslem purchased shares from only two of the bellwether petitioners, five from petitioner Glen Reed at

$400 a share and one from petitioner Arthur Workman for $350 a share. There is no evidence that Verl Haslem sold those shares at a profit. So there is no evidence that he made any misstatement to the sellers as to the market price of the shares he purchased. His mere failure to inform the sellers that he was going to sell to someone else is not a violation of 10b-5.

Moreover, it is patent that Workman would not rely solely on Haslem's representations of the market value of the stock, true or false, if any were made, because the record reveals that Workman would be expected to know more about the value of the stock than Haslem.

There is specific evidence of lack of reliance on Reed's part in connection with the sale. He testified that he believed his stock was worth $500; yet he sold for $400 to Haslem.

Haslem did not purchase stock from any of the other ten bellwether petitioners. He did not participate in the negotiations involving any other sales by the ten petitioners. There is no evidence that he made any misstatements or was guilty of any nondisclosure with respect to any of the other ten petitioners. The only connection he had with any of the other transactions involving the other ten petitioners was to notarize two of the affidavits involved. He was a complete stranger to all of the other transactions.

ARGUMENT

This respondent contends that it was not guilty of violating Rule 10b-5 because its employees, Gale and Haslem, were not guilty of its violation.

This case, quite properly, was not a class action, though the trial court slipped into treating it that way. In determining whether or not Gale or Haslem violated the prohibitions of Regulation 10b-5, the burden of proof rests upon each petitioner to show that he individually was a victim of the type of device, scheme, artifice, misstatement, nondisclosure, act, practice, or course of business prohibited by the regulation; that some such conduct was practiced and imposed on him by Gale or Haslem, or both of them, and that such conduct was the proximate cause of damage to him. The evidence relating to each individual must be examined and each case evaluated separately to determine if there was or was not a violation with respect to that individual. The compensations received, the knowledgeability of the petitioners and the conduct of the Bank employees vary with respect to different petitioners. In many instances, there was no contact whatsoever between the petitioner who sold his stock and any Bank employee.

The trial court took the easy road and lumped all of the petitioners together, and doing so, in the abstract, found 10b-5 violations, and blanketed all the petitioners with favorable Findings of Fact and Conclusions of Law, which may or may not have been applicable to particular petitioners. The court reversed the old adage: It was not able to see the trees for the forest.

Regulation 10b-5 (17 C.F.R. 240 10b-5), which was promulgated under Section 10(b) of the Securities Exchange Act of 1934 (Title 15 U.S.C., Sec. 78(j), provides that with respect to the purchase or sale of a security, it shall be unlawful:

"(a) To employ any device, scheme or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person . . ."

One of the most significant cases as related to the case at bar is *List v. Fashion Park, Inc.*, 340 F.2d 457 (2nd Cir. 1965). In that case plaintiff owned a substantial number of shares in Fashion Park, Inc., a clothing manufacturing company which was not prosperous. He sold his shares to four defendants at $18.50 a share and soon thereafter the company merged with the Hat Corporation, which paid $50.00 per share. The plaintiff sued the four buyers, charging violation of 10b-5 on the grounds that they did not disclose to him that one of them was a director of Fashion Park, and that the directors of Fashion Park had resolved to attempt to sell the corporation to another company and that there was a possibility of such a sale.

The trial court, hearing the case without a jury, held that "there was insufficient evidence of a conspiracy, that plaintiff would have sold even if he had known that one of the buyers was a director of Fashion Park, and that the undisclosed possibility that Fashion Park might be sold was not a material fact."

The appeal court sustained the trial court's decision.

In many respects, of course, that case and the case at bar are not analogous. In that case the buyer was an

"insider." In the case at bar, Gale and Haslem are not "insiders." There the seller was an experienced investor. Here the sellers were not. However, with respect to the application of the principle of reliance on misstatements or nondisclosures, the two cases are sufficiently analogous to provide some assistance. It is the burden of each petitioner to show that any misstatements or nondisclosures made by Gale and Haslem were material and that they relied on them, that is, they would not have sold the stock had it not been for the misstatements or nondisclosures of Gale and Haslem.

The following statements of the court in the *List* case are of significance:

> "Because there is much disagreement and confusion among the parties concerning the meaning and applicability of 'reliance' and 'materiality' under Rule 10b-5, we think it advisable first to set forth the well known and well understood common law definitions of these terms and the reasons for the rules in which the terms are incorporated. Insofar as is pertinent here, the test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in [the recipients] loss.' Restatement, Torts §546 (1938); accord, Prosser, Torts 550 (2 ed. 1955); I. Harper & James, Torts 583-84 (1956). The reason for this requirement, as explained by the authorites cited, is to certify that the conduct of the defendant actually caused the plaintiff's injury. The basic test of 'materiality,' on the other hand, is whether 'a reasonable man would attach importance [to the fact misrepresented] in determining his choice of action in the transaction in question.' Restatement, Torts §538(2)(a); accord, Prosser, Torts 554-55; I. Harper & James, Torts 565-66. Thus,

to the requirement that the individual plaintiff must have acted upon the fact misrepresented, is added the parallel requirement that a reasonable man would also have acted upon the fact misrepresented.

"The parties to this suit apparently agree that the requirement that a misrepresentation be material is carried over into civil cases under Rule 10b-5 involving nondisclosure by an insider. Moreover, the meaning of the term is ostensibly the same as at common law. III Loss, Securities Regulation 1431. 'Materiality' encompasses those facts 'which in reasonable and objective contemplation might affect the value of the corporation's stock or securities . . .' Kohler v. Kohler Co., 319 F.2d 634, 642 (7 Cir. 1963).

"Disagreement centers on the applicability and meaning of the requirement that reliance be placed upon the misrepresentation. Our examination of the authorities satisfies us that this requirement also is carried over into civil suits under Rule 10b-5. Reed v. Riddle Airlines, 266 F.2d 314, 319 (5 Cir. 1959); Kohler v. Kohler Co., 208 F. Supp. 808, 823 (E.D. Wis. 1962), aff'd, 319 F.2d 634 (7 Cir. 1963); Mills v. Sarjem Corp., 133 F. Supp. 753, 767 (D.N.J. 1955); Speed v. Transamerica Corp., 5 F.R.D. 56, 60 (D.Del. 1945); accord; III Loss, Securities Regulation 1765-66. The dicta in Kardon v. National Gypsum Co., 83 F.Supp. 613, 614 (E.D.Pa. 1947), are not necessarily to the contrary. Plaintiff also relies on the fact that in Speed v. Transamerica Corp., 99 F.Supp. 808, 833, the court allowed a class action by the defrauded sellers, from which he infers that no inquiry into the reasons why each seller transferred his stock is required by Rule 10b-5. However, a comparison of that decision with the opinion in an earlier phase of the same suit, Speed v. Transamerica Corp., 5 F.R.D. 56, 60, shows that a class action

was allowed only because the court was convinced that all members of the class had relied on defendant's misrepresentation.

"(8,9) This interpretation of Rule 10b-5 is a reasonable one, for the aim of the rule in cases such as this is to qualify, as between insiders and outsiders, the doctrine of *caveat emptor*—not to establish a scheme of investors' insurance. Assuredly, to abandon the requirement of reliance would be to facilitate outsiders' proof of insiders' fraud, and to that extent the interpretation for which plaintiff contends might advance the purposes of Rule 10b-5. But this strikes us as an inadequate reason for reading out of the rule so basic an element of tort law as the principle of causation in fact.

* * * *

"The proper test is whether the plaintiff would have been influenced to act differently than he did act if the defendant had disclosed to him the undisclosed fact. Speed v. Transamerica Corp., 99 F.Supp. 808, 829; Kardon v. National Gypsum Co., 73F.Supp. 798, 800 (E.D.Pa. 1947). To put the matter conversely, insiders 'are not required to search out details that presumably would not influence the person's judgment with whom they are dealing.' Kohler v. Kohler Co., supra, 319 F.2d art 642. This test preserves the common law parallel between 'reliance' and 'materiality,' differing as it does from the definition of 'materiality' under Rule 10b-5 solely by substituting the individual plaintiff for the reasonable man. Of course this test is not utterly dissimilar from the one hinted at by the trial court. That the outsider did not have in mind the negative of the fact undisclosed to him, or that he did not put his trust in the advice of the insider, would tend to prove that he would not have been influenced by the undisclosed fact even if the insider had disclosed it to him."

The writer will attempt to apply the foregoing principle of law to the facts involving each of the individual petitioners to the extent that the limitations of a brief will permit. The entire testimony of the petitioners covers only 146 pages in the record and the writer submits study of their testimony will reveal that each one fails to make a case.

PETITIONER GLEN REED

According to the Court's Findings of Fact (A. 474-75) Reed sold five shares to Gale for $350 a share after the shares had been properly offered for sale to the Tribe *at that same price*. Thereafter Gale sold the shares to a white man for $530 a share.

This might be considered respondents' "worst" case of the twelve, inasmuch as it is the *only one which involves a resale by Gale on which there is evidence that Gale made a profit.*

Petitioners' complaint here is that Gale violated 10b-5(2) in that Gale failed to disclose to Reed that he was going to sell the shares for $530 a share and that he told Reed that $350 a share was all that people were paying.

This is the *one* transaction involving the twelve petitioners to which the following language of the Circuit Court's opinion applies:

> "As to the elements to be established, the record shows that the individual defendants made a misstatement of a material fact in representing, in those instances wherein they purchased stock for sale at a personal profit, that the prevailing price or market price was the figure at which their own purchase was made. This representation was

> obviously false in those instances in view of the fact that they resold the shares almost immediately at a higher price." *Reyos v. United States*, 431 F.2d 1337 (10th Cir. 1970).

The Circuit, however, recognized that in spite of the misstatement, there was no liability because there was no reliance. There was no evidence of reliance by Reed. It can be affirmatively inferred from the evidence that Reed would have sold to Gale and at the same price, even if Gale had told him he was going to resell at $530 a share to one Phelps who lived out of the state because Reed said he was "happy to get that money," (A. 172) and even though he thought the shares were worth $500 apiece, he accepted $350.00 (A. 173).

On August 30, 1964 (A. 475-76), Reed sold five shares at $400 a share to Verl Haslem. Inasmuch as this sale was after August 27, there was no requirement to offer to the Tribe, no affidavit to be executed and the seller endorsed the certificate itself rather than signing a stock power, and had an apportunity to read the warning against sale on the stock certificate. Haslem resold the stock to a white man. There is no evidence that he made any profit (A. 475-76). Consequently, there is no evidence that the market was in excess of $400 a share at that time. Apparently the trial court's position was that the fatal nondisclosure violating 10b-5 was Haslem's failure to disclose that he was going to sell to someone else.

A failure of disclosure, unassociated with any affirmative representation, is not a violation of 10b-5 according to the recent case of *Wessel, et al, v. Buhler*, Federal Securities Law Reports 92,929, decided by the Ninth Circuit on January 22, 1971. The court said:

> "We find nothing in Rule 10b-5 that purports to impose liability on anyone whose conduct consists solely of inaction. On the contrary, the only subsection that has any reference to an omission, as distinguished from affirmative action, is subsection (2) providing that it is unlawful 'to omit to state a material fact necessary in order to make the statements made . . . not misleading, 'i.e.,' an omission occurring as part of an affirmative statement. (See Brennan v. Midwestern United Life Insurance Co. (7th Cir. 1969) 417 F.2d 147, 154-55.) We perceive no reason, consonant with the congressional purpose in enacting the Securities and Exchange Act of 1934, thus to expand Rule 10b-5 liability. (Cf. SEC v. Texas Gulf Sulfur Co., supra, 401 F.2d at 866-68 (J. Friendly, concurring specially).) On the contrary, the exposure of independent accountants and others to such vistas of liability, limited only by the ingenuity of investors and their counsel, would lead to serious mischief."

Reliance required by the cases is not established. Reed would certainly assume that Haslem might sell to someone else and at a profit. There is no evidence that if Haselm had told him he was going to sell to someone else that he would have refused to sell to Haslem. There is no evidence as to what the undisclosed resale price was. Consequently, there is no evidence that the nondisclosure was material. So the materiality requirement to establish a violation is not satisfied.

PETITIONER LETHA HARRIS WOPSOCK

Letha Harris Wopsock, according to the Court's Findings of Fact, (A. 479-80) subsequent to August 27, 1964, sold three shares to Gale for $350 a share. Gale purchased a truck with the two shares for $700.00 (A.

74), realizing no profit. Petitioners' position apparently is that Gale violated 10b-5(2) by failing to disclose that he was going to resell. Certainly that does not satisfy the requirements of materiality or reliance and constituted no violation of 10b-5(2) in light of the fact that petitioner Wopsock had previously been told by Mrs. Logan, second in command at the Uintah and Ouray Indian Agency, that the stock was worth $700 a share (A. 481). In spite of that she was willing to sell to Gale for $350 a share. This petitioner's testimony (A. 27-52) does not reveal any misrepresentation on the part of Gale.

There is no finding by the trial court or evidence in the record of the employment of any device, scheme or artifice to defraud in violation of 10b-5(1) or any act, practice or course of business which operated as a fraud or deceit in connection with this transaction involving Mrs. Wopsock. There is no evidence of reliance or materiality.

Petitioner Wopsock sold one share to Gale in October ($400) and in November ($350) of 1964 (A. 480). With respect to these two sales, the court made *no finding*, and there is no evidence in the record that Gale was guilty of any misstatement or nondisclosure. None is claimed by the petitioner. There is no evidence or finding of a device, scheme, artifice, act, practice or course of business operating to defraud in violation of 10b-5(1) and (3). If there were any evidence or finding of any of the acts prohibited by 10b-5, there is obviously no evidence of materiality or reliance in connection with these two transactions (A. 480).

According to the trial court's Findings (A. 478-79) Wopsock, prior to August 1, 1963, exchanged five

shares and a 1960 GMC pickup truck with one Clyde Murray for a new 1962 GMC pickup truck and camper. She, according to the trial court, told Gale she was getting a truck and she signed an affidavit indicating that she valued the amount she received for the stock at $500 a share. There is no evidence or finding as to the actual value of the vehicle she received, so there is no evidence or finding that Gale had any knowledge that she had received anything less than $500 worth of value for each share (A. 479). Bearing on the issues of 10b-5(1) and (3) involving devices and schemes, etc., there is no finding or evidence *that Gale had any connection or communication with Clyde Murray in connection with this or any other sale.* It is the court's finding that

> "Neither Gale, Haslem, nor the Bank directly received anything from the sale except a fifty cent notary fee." (A. 479).

There is also no finding or evidence that Gale or Haslem or the Bank received anything *indirectly* from the sale. Consequently, there is no finding or evidence of any device, scheme, artifice, act, practice or course of business on the part of the respondents which was fraudulent in the 10b-5 sense, and no finding or evidence or any claim of misstatement or nondisclosure on the part of respondents in connection with this transaction. Again it must be noted that prior to this sale, she had been informed by Mrs. Logan that the stock was worth $700 a share, yet she was willing to sell for $500. There is no establishment of materiality or reliance.

In February, 1964, she transferred two shares to one Hoopes (A. 479), a trading post owner, for what she considered to be a value of $700 per share. She had

advertised the stock for $500 a share. Gale notarized her affidavit on her representation to him that she had received $1,400 for the two shares. There is no evidence or finding that Haslem knew anything about or had anything to do with this transaction. There was no evidence or finding that Gale or Haslem had any communication or connection with Hoopes regarding the transaction. The court found that

> "Neither Gale, Haslem or the Bank directly received anything from this transaction except a fifty cent notary fee." (A-479-80).

There is no evidence or finding that they received anything *indirectly*.

Consequently, there was no evidence or finding of a device, scheme, artifice, misstatement, nondisclosure, act, practice or course of business prohibited by 10b-5. If there were, there is no finding or evidence of materiality or reliance.

PETITIONER JOSEPH ARTHUR WORKMAN

Workman on November 27, 1964, sold one share of stock to Verl Haslem for $350 by endorsement of the stock certificate (A. 490). Haslem sold it to his brother. There is no evidence that Haslem made a profit. According to the court's Findings, Workman had been one of the five members of the Board of Directors of the Affiliated Ute Citizens from 1958 to 1961 (A. 489), which presented the mixed blood group.

> "He knew and understood that his Ute Distribution Corporation stock represented an interest

> in the tribal minerals . . . (A. 490). He knew the purpose and had more than the ordinary knowledge of the possibilities of the corporation, as well as what his stock represented. The distribution on the stock was part of the distribution of assets of the tribe to the individual members. He attended numerous meetings prior to termination where termination was discussed. . . . Occasionally they discussed the potential value of the stock and Mr. John Boyden, counsel for the council of the mixed-bloods, often advised the people in attendance to retain their stock." (A. 490-91).

There is a reasonable inference from the record that he knew much more about the stock and its value than Verl Haslem knew. Having been on the Board of Directors of the Affiliated Ute Citizens, he was almost, in effect, an "insider" in contemplation of 10b-5, whereas Haselm was an outsider. There is no finding or evidence or claim of a device, scheme, artifice, misstatement, nondisclosure, act, practice or course of business in violation of 10b-5. There is no evidence of reliance or materiality.

In February, 1964, prior to the Haslem transaction, Workman sold six shares to one Huish for $500 a share, the price at which he had advertised the stock. He received that amount and signed a true affidavit, notarized by John Gale (A. 489). "Workman was satisfied with one of his sales for $500 per share and still is." (A. 490) (Court's Finding of Fact). Actually he testified he was satisfied with all of his sales at $500 and still is (A. 324) and he was knoweledgeable with regard to the stock and remained satisfied in spite of the outlandish claims of his attorneys with regard to the value of the stock. Obviously, Gale, Haslem and the Bank had absolutely nothing to

do directly or indirectly with promoting or inducing this sale and did not benefit from it.

Workman testified that he was present at meetings of the mixed bloods when their own attorney advised them not to sell their stock (A. 326). He was part of the Board which sent out letters to the petitioners advising them not to sell. Obviously, discouragement from Bank personnel would not have influenced him.

The trial court denied Workman a judgment against the defendant United States of America because Workman, the court thought, was sufficiently knowledgeable that he was guilty of contributory negligence and so could not recover against the United States of America (A. 537). Though the Bank, Gale and Haslem also claimed contributory negligence as a defense (Pretrial Order) (A. 18), the trial court unfathomably ignored that and gave him judgment against them. Haslem bought one share from this man, who knew more about the stock than Haslem did, yet the Court unaccountably and inexplicably awarded him judgment against the Bank, Haselm and Gale on all seven shares in the sum of $10,469.07! The court's decision with respect to Workman on the 10b-5 is utterly incredible. The writer is convinced that an overburdened court must simply have committed an inadvertent $10,000 error and did not actually intend such an appalling, unsupportable result. It is a prime example of how the trial court failed to see the trees for the forest. Such inattention and disregard of the facts of the individual cases characterized the court's entire decision. The court simply took a broad brush and painted everybody the same color.

Gale and Haslem did not purchase any stock from any of the other nine designated petitioners. There isn't space in a brief to dwell in detail on each one individually as counsel would like to do, but he beseeches this Court to examine the trial court's findings with respect to the sales made by each one (A. 474-498) and the testimony in the record, and search for evidence that Gale, Haslem or the Bank were involved in a single act that could conceivably be one prohibited by 10b-5, or if they did, that the petitioners have established reliance.

The court found with respect to each of the other nine petitioners that neither Gale, Haslem nor the Bank profited "directly" from the transactions and does not point out where or how they profited "indirectly."

PETITIONER FRED LAROSE BURSON

With respect to Burson's first five share sale, the court finds:

> "Neither Gale, Haslem nor the Bank had anything directly to do with the sales negotiations, nor did they receive anything from the sale." (A. 479).

With respect to the second five share sale, the court finds:

> "Neither Gale, Haslem nor the Bank directly received anything from the sale except a fifty cent notary fee paid to the Bank and they did not participate in the negotiations involved in the sale." (A. 477-78).

Burson testified that he got $5,000 or the equivalent thereof for his stock (A. 195) and that "I don't think I got beat." (A. 191).

Never does the court point out how Gale, Haslem or the Bank benefited indirectly from the Burson sales.

PETITIONER LOUISE ALLEN CASE

With respect to Mrs. Case' sale of her first five shares to one Labrum, all the court could find with respect to Gale was that he received a fifty cent notary fee. (A. 482).

She then sold three shares to Richard Murray at $440 a share. Her signature was guaranteed and her affidavit notarized by Gale. He did not participate in the negotiations involved in this sale (A. 482-83). The shares were sold to Gullstrom and Wood of Illinois, whom the court found to be "clients" of Gale (A. 482). There is no evidence that Gale received anything from the transaction and Haslem had absolutely nothing to do with it. They were not involved "in connection with the purchase or sale" of the security.

She then sold two shares to one Bastian for $400 a share (A. 483). Gale and Haslem had nothing to do with this transaction. They never talked to the petitioner about it, did not guarantee the signature or notarize the affidavit, and there is no evidence that they had any communication with Bastian with respect to the transaction. There is no evidence or finding that they even knew the transaction took place. How the court could render judgment against Gale, Haslem and the Bank in this transaction on any basis is beyond understanding.

PETITIONER MELVIN REED

With respect to Melvin Reed's sale of ten shares to Richard Murray (A. 484), Gale notarized the affidavit.

There is no evidence or claim that he was guilty of any misstatement or nondisclosure or that the shares were resold or that he made any profit or that this sale was any part of a device, scheme, artifice, act, practice or course of business to defraud. The findings show that Haslem had nothing to do with the transaction. There is no evidence he ever heard of it.

Reed, at the time of trial, was serving a term in the State Prison for forgery (A. 484). Nevertheless, the trial court chose to believe his testimony rather than Justice of the Peace Gale's and found that because Gale fined him for being drunk (A. 485) and later Murray got him drunk again and sold him a Cadillac for his stock and John Gale notarized the affidavit, Gale was guilty of violating 10b-5 and the court rendered judgment against Gale, Haslem and the Bank for $14,969.07.

There was no finding of a resale of the stock to Gale or to anybody else. There was no finding that Gale, the Bank or Haslem made a dime out of the transaction. Haslem had nothing to do with it. Gale was a victim of guilt by association with a used car dealer. The Bank suffered because its employee Gale was a Justice of the Peace who did his duty, and Haslem is still shaking his head wondering how the court mixed him up in it!

PETITIONER MARGUERITE MURRAY HENDRICKS

Mrs. Hendricks sold five shares to Clyde Murray (A. 487-88) and five to Richard Murray (A. 488), and with respect to both transactions, the court finds:

"Gale did not participate in the sales trans-

actions and he received only a fifty cent notary fee." (A. 488).

Haslem isn't mentioned by anyone anywhere in connection with the transaction. He didn't even get fifty cents.

PETITIONER LEONARD RICHARD BURSON

Burson sold ten shares to LaVere Labrum (A. 491) for an automobile. The court finds:

> "Gale did not participate in the sales negotiations and received nothing from the transaction except a notary fee." (A. 492).

Haslem is nowhere mentioned in the record with respect to this transaction. There is no evidence anywhere of any tie up between Gale and Labrum. Burson was "satisfied" with the transaction (A. 491). There was no complaint or evidence that the car was not worth the price Labrum asked for it (A. 491). Burson had no complaint—only his attorneys.

PETITIONER ORAN F. CURRY

Curry sold one share to Mr. Chasel and one to Mr. Swain. The affidavits were notarized by Gale. Gale did not participate in the sales negotiations and received nothing but a fifty cent notary fee (A. 492, 493).

Later Curry sold three shares to Clyde Murray for $600 a share. Gale notarized the affidavit. The court found:

> "Except as in these findings indicated, Gale did not participate in the sales negotiations and

received nothing but a fifty cent notary fee." (A. 493).

There is nothing "indicated" anywhere in the Findings to the contrary.

Curry then sold two shares to Bastian and Gale guaranteed the signature. Gale had nothing to do with the affidavit. Someone else notarized it—an Irene K. Ruppel (A. 493). The court states again:

> "Except as in these findings indicated Gale did not participate in the sales negotiations and received nothing but a fifty cent notary fee." (A. 493).

No exception is "indicated" anywhere in the Findings. There is no evidence of any communication between Gale and Bastian relating to the sale. Gale received no benefit from the transaction and the Bank did not even receive a fifty cent notary fee. The record does not reveal whether or not Irene K. Ruppel got a notary fee or whether or not she was involved "in connection with the purchase or sale of a security."

After August 27, Curry sold two shares to Bastian. Gale had no connection whatsoever with these sales. Verl Haslem guaranteed the signature on the stock certificates which Curry endorsed. The court found:

> "Except as in these findings indicated Haslem made no representation, did not participate in the sales negotiations and received nothing from the transactions." (A. 494).

Nowhere does the court indicate in the Findings that Haslem *ever* made any representations to Curry or participated in any sales negotiations involving him or ever received anything from the transactions (A. 494).

"Curry had been prominent in tribal affairs. He knew the Ute Distribution Corporation owned minerals, lands and possibly future claim money that he had coming from the government." (A. 494-95) (Court Findings of Fact). He was the father of a mixed blood, Reginald Oran Curry (A. 247), who had been since July, 1967, the administrative officer for the Ute Indian Tribe, and as such had been the liaison officer between the Ute Indian Tribe and the Bureau of Indian Affairs of the state and federal governments (A. 248).

At the time Curry and his one son, Richard, (also a petitioner) sold their stock, Reginald Oran Curry, the other son, was Resource Director of the Ute Indian Tribe and had served in that capacity for "a number of years." (A. 248). Reginald (Rex) testified his "capacity in that position was to work with the resources of the tribe as liaison between the Ute Indian Tribe and the Bureau of Indian Affairs and other governments and helping in the acquisition of lands, leasing of lands, this type of work, working with water rights belonging to the Ute Indian Tribe for their protection and advisory to the business committee." (A. 248). Reginald has testified before a Congressional Committee concerning tribal affairs (A. 248). He did not sell his stock.

When Oran Curry and his son, Richard, had a son and brother to rely on who, it is reasonable to conclude, knew as much as any man in the world about the resources represented by their stock, to assume that they would rely on anything told them by Haslem or Gale or anyone connected with the First Security Bank is unrealistic. If they didn't believe their knowledgeable son and brother, who didn't sell his stock, how could they be

expected to believe Gale or Haslem? Certainly Oran and Richard Curry were in a position to know from their son and brother infinitely more about the value of their stock than Gale or Haslem or anyone else at the Bank could tell them.

Because of Curry's knowledgeability, the trial court denied him recovery against the government, but granted judgment against Gale, Haslem and the Bank (A. 527, 537). Six of the ten shares Curry sold with the certificates in his hands, which he signed (A. 159-61). He could have read the red warning label; nevertheless the trial court lumped him in with those who are supposed to have been duped by the Bank because they did not have a chance to read the label.

PETITIONER STEWART E. REED

Reed sold five shares to Clyde Murray. Gale notarized the affidavit. The trial court used its stock statement:

> "Except in these findings otherwise indicated, Gale and Haslem did not participate in the sales negotiations and received nothing from the transaction." (A. 495).

Again the court nowhere otherwise "indicates." Another nothing added onto nothing.

Then Reed sold five shares to one Wallace Davis. Haslem notarized the affidavit. The court repeated the same phrase quoted with respect to the sale to Murray (A. 496). Gale had nothing to do with the transaction. This nothing added to nothing resulted in another judgment against Gale, Haslem and the Bank for $14,969.07, which the Circuit reversed.

PETITIONER RICHARD H. CURRY, JR.

Curry sold five shares to Clyde Murray for $500 a share. Gale guaranteed his signature on the stock power, but did not notarize the affidavit. It was notarized by someone else who was not a Bank employee. Gale did not participate in the sales negotiations and received nothing from the transaction (A. 497-98).

After August 27, 1964, Richard Curry signed a stock certificate transferring three shares to Richard Murray. Gale and Haslem had nothing to do with the transaction. Curry's signature on this stock certificate was not guaranteed, and, of course, there was no affidavit involved (A. 498). Later, also after August 27, Curry signed a certificate transferring two shares to Mr. and Mrs. Harmston. The signature was guaranteed by Gale. Gale and Haslem had nothing to do with the sales transaction (A. 498). This plaintiff is the brother of Reginald Curry, previously described, who is the Ute Tribe Administrator and former Resource Director of the Tribe (A. 248).

No elements whatsoever of a 10b-5 violation are evident with respect to any of Richard Curry, Jr.'s sales. Richard Curry at one time was an employee of the Duchesne County Sheriff and in the Army during the Korean War he attained the rank of sergeant (A. 496-97).

PETITIONER CHARLES T. REED

After August 27, 1964, Reed sold his ten shares to Richard Murray by signing the certificate (A. 498). The deal was consummated in Murray's garage. Reed and Murray came to the Bank and Gale guaranteed the

signature. Gale did not participate in the sales negotiations (A. 498-99). There is no evidence that Gale received anything from the sale (A. 499). Haslem had nothing whatsoever to do with the transaction. There is no evidence that he had any knowledge of it.

The respondent Bank submits that Gale and Haslem with respect to the twelve cases reviewed above did not violate Rule 10b-5. No other agent of the Bank was accused by the trial court of violating that rule, and therefore the Bank did not violate 10b-5.

The trial court continued to add nothing to nothing to nothing and came up with something that was nowhere supported in his own Findings or in the evidence. How time and time again the trial court could find with respect to individual after individual, case after case, that Gale and Haslem did nothing prohibited by law, and in some cases did nothing at all, but were complete strangers to the transactions, and then total them up and find that they cheated everybody, is incomprehensible to the writer.

It was also incomprehensible to the Tenth Circuit.

CONCLUSION

Respondent, First Security Bank of Utah, N.A., respectfully asks this Honorable Court to uphold the de-

cision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, MARVIN J. BERTOCH, hereby certify that I mailed, postage prepaid, three copies of the foregoing Brief for Respondent, First Security Bank of Utah, N.A., to the attorneys listed below at the addresses below on the 30th day of August, 1971:

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